

RECEIVED

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20544

JAN 3 1994

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of )

)  
Amendment of the Commission's )  
Rules to Establish New Personal )  
Communications Services )

General Docket No. 90-314

RM-7140; RM-7175; RM-7618

TO: The Commission

**COMMENTS OF RAND MCNALLY  
ON  
PETITIONS FOR RECONSIDERATION AND CLARIFICATION**

**RAND MCNALLY & COMPANY**  
Deborah Lipoff  
Assistant General Counsel  
8255 North Central Park  
Skokie, Illinois 60076  
(708) 329-6258

Dated: January 3, 1994

No. of Copies rec'd 024  
List A B C D E

**COMMENTS OF RAND McNALLY  
ON  
PETITIONS FOR RECONSIDERATION AND CLARIFICATION**

Rand McNally & Company ("RMC") respectfully submits these comments on selected petitions to the Commission to reconsider the rules contained in the Commission's Second Report and Order adopted September 23, 1993 and released on October 22, 1993 in connection with the establishment of new Personal Communications Services ("PCS"). These comments are also being served upon the few petitioners of which we are aware that have filed petitions relating to the specific issues discussed below. If requested, we would be pleased to serve additional parties as directed by the Commission.

**I.     Introduction**

The FCC has selected RMC's Major Trading Areas (MTAs) and Basic Trading Areas (BTAs), as set forth in the 1992 edition of RMC's Commercial Atlas & Marketing Guide (also available in RMC's Trading Area System MTA/BTA Diskette), as the basis for establishing geographic boundaries for the FCC spectrum auction to be held in connection with the PCS. As we have indicated in our earlier submissions to the Commission on this subject (see our letters to the Commission dated September 27, 1993 and December 8, 1993) and as discussed more fully below, the MTAs and BTAs are proprietary to RMC and protected under the federal copyright law, 17 U.S.C. §§ 101-810.

The petitions to the Commission (as well as communications that RMC has received independently from potential users and resellers of RMC's proprietary data) have increased our concerns that the Commission's use of the MTAs and BTAs may require RMC to expend significant resources to defend and police our copyrights. Accordingly, we submit the following modification to our proposal of December 8, 1993. We believe that the

proposal as modified below will allow us to protect the copyrights in our works, and at the same time continue to provide reasonable access for bidders and other users to the relevant boundary data.

Alternatively, if the Commission is unable to use RMC's MTAs and BTAs under the terms of our modified proposal as set out below, we respectfully urge that it adopt other boundary definitions for the PCS.

## **II. The MTAs And BTAs Are Protected Under Federal Copyright Law**

In one petition filed with the Commission (see Telocator, Petition for Reconsideration, filed December 8, 1993) and in communications that RMC has received independently, some potential users and resellers of RMC's MTA and BTA boundaries have claimed that the boundaries cannot be copyrighted and/or that the Commission may cure our assertion of rights by appropriating RMC's property. As explained below, these claims are without merit.

Compilations of data or other materials are protectible subject matter under the federal copyright law. 17 U.S.C. § 103 ("The subject matter of copyright . . . includes compilations . . ."). The Copyright Act (17 U.S.C. § 101) defines a "compilation" as:

[A] work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated or arranged in such a way that the resulting work as a whole constitutes an original work of authorship. The term 'compilation' includes collective works.

The Supreme Court in Feist Publications, Inc. v. Rural Telephone Service Co., 111 S. Ct. 1282 (1991) emphasized that the originality requirement for compilations is not a

stringent one. According to the Court: "Presumably, the vast majority of compilations will pass this test [independent selection and arrangement and some minimal level of creativity] . . . ." Id. at 1294.

There is no doubt that RMC's compilations -- the Commercial Atlas & Marketing Guide (which contains a map reflecting the MTAs and BTAs) and the RMC Trading Area System MTA/BTA Diskette (which contains a listing of the counties that comprise the various MTAs and BTAs) -- meet the requisite standard of originality. They are not merely discovered facts, but the product of selection, coordination and arrangement that required the exercise of judgment on the part of RMC compilers.

As explained in the Commercial Atlas & Marketing Guide, creation of the BTA and MTA boundaries involved "an intensive study of such factors as physiology, population distribution, newspaper circulation, economic activities, highway facilities, railroad service, suburban transportation, and field reports of experienced sales analysts." (See 1992 Commercial Atlas & Marketing Guide, at p. 39) In this process, RMC used its creativity, judgment and discretion initially to select, from among the many possibilities, the factors that would be appropriate for dividing the nation into trading areas, and then to apply these factors to select the BTA centers important enough to justify having a separate trading area, and then to coordinate and arrange all remaining counties into one of the BTAs, and then finally to coordinate and arrange the BTAs into MTAs.

Thus, the boundaries for BTAs were not dictated by external considerations, but reflect the judgment and creativity of RMC and its employees, as well as a considerable investment of resources.

We further note that RMC's copyright in the 1992 Commercial Atlas & Marketing Guide (as well as other editions of such work) has been registered in the Copyright Office (Registration No. TX 3 270 089), and that, in judicial proceedings, the Certificate of Registration constitutes "prima facie evidence of the validity of the copyright and of the facts stated in the certificate." 17 U.S.C. § 410(c).

Clearly, the suggestion that the BTAs and MTAs are mere uncopyrightable facts and that the issues raised by RMC's assertion of proprietary rights can somehow be cured by the Commission simply appropriating them and publishing them in the rules is entirely without merit. It reflects a misunderstanding of the copyright law, the process through which the BTAs and MTAs were formulated, or both. For the reasons discussed above, the BTAs and MTAs are protected by RMC's copyrights, and this valuable intellectual property cannot simply be appropriated by the Commission or by any third party.

In addition, the fact that Arbitron's "Areas of Dominant Influence" were referenced in past rules of the Commission does not justify use of RMC's BTAs and MTAs without appropriate protection for RMC's considerable investment of resources. (See Telocator, *Petition for Reconsideration*, filed December 8, 1993, at note 33 referencing 47 C.F.R. § 73.3555(d)(3)) We are not familiar with the circumstances that relate to the Commission's references to Arbitron's materials in its rules, or the reason why Arbitron may have acquiesced in this use of its material. But Arbitron may have derived advantages that made it unwilling to assert copyright protection over the referenced material, or may for other reasons have been unable to assert such rights.

**III. RMC's Modified Proposal for Disclosure and Use of MTA and BTA County Listings**

RMC believes that its December 8 proposal to the Commission very adequately addressed the access needs of FCC auction participants and related parties. After further review of the proposal and petitions filed in the Commission in this regard, however, we determined to offer the following modifications to our earlier proposal. We believe that the modified proposal better meets the reasonable needs and interests of participants and related parties in the FCC auction for access to geographic boundary information while more effectively protecting RMC's copyright in the MTA/BTA county listings.

**A. Permission to FCC:**

RMC will provide to the Commission, without charge, a hard copy listing by county of the MTAs and BTAs ("the print listing"), to make available for public inspection (but not for reproduction) in connection with its rules relating to PCS (and possibly other Commission-licensed services with RMC's approval), subject to the following conditions:

1. The Commission will not permit reproduction of the print listing. The print listing available for inspection will contain the copyright notice and legend set forth below:

**Basic Trading Areas and Major Trading Areas  
Copyright © 1992 Rand McNally & Company. Listings  
of Counties Comprising the Basic Trading Areas and  
Major Trading Areas Used by Permission.**

**Recipient May Use these Listings of Basic  
Trading Areas and Major Trading Areas For Internal  
Purposes Only. Reproduction, Resale, Licensing or  
Other Distribution of these Listings in Whole or  
Substantial Part is Prohibited Unless Expressly Licensed**

**by Rand McNally. Creation and Resale, Licensing or Other Distribution of Derivative Works Created from these Listings is Prohibited Unless Expressly Licensed by Rand McNally.**

Listings of Basic Trading Areas and Major Trading Areas by county are available from Rand McNally, 8255 North Central Park, Skokie, Illinois 60076, (800) 284-6565 in hard copy or electronic form. A licensee of such listings from Rand McNally will be granted a non-exclusive license to reproduce the work and to create derivative works therefrom solely for internal purposes in connection with proceedings under FCC General Docket 90-314 or related FCC proceedings. Licenses for resale or redistribution of the listings in whole or substantial part can be obtained from Rand McNally. Contact Rand McNally at (800) 284-6565 concerning the terms and conditions for such a license.

2. The print listing will not be published in the Federal Register or otherwise published as part of the FCC's rules. This modification is made to better protect RMC's copyright in light of the FCC's informing us that no copyright notices may appear in the Federal Register.
3. However, RMC will make copies of the print listing available under the terms and conditions set forth in B and C, below.
4. Note, the print listing will indicate the changes made to RMC's MTAs and BTAs by the FCC for purposes of PCS.

**B. License to End Users**

1. In addition to the publicly available copy of the print listing as described in A, above, RMC will make its copyrighted MTA/BTA

boundaries available to end users for the purposes described below in four ways:

- (a) through license of a diskette version of the listing in a format that aids computer-assisted extraction and manipulation of the boundary data, which RMC has already made and continues to make available to various end users at a one-time reasonable cost;
- (b) through purchase of the Commercial Atlas & Marketing Guide (note that each of the 1987, 1988, 1989, 1990, 1991, 1992, 1993, and 1994 editions of the Commercial Atlas & Marketing Guide contain the 1992 MTAs/BTAs on which the PCS service areas are proposed to be based, and that these editions are also available at libraries throughout the United States);
- (c) through license of a print listing, which RMC will make available to end users at a one-time reasonable cost which will be significantly lower than the cost of the diskette license; and
- (d) through license (by repackagers or resellers of the listing licensed by RMC) of the diskette version, the print listing or derivative works created from the listing, which RMC expects such licensed resellers and repackagers will make available at costs established by such resellers or repackagers.

2. End users (such as participants in the FCC auction) who license the print listing or diskette version of the listing from RMC as described above will thereafter have a non-exclusive, perpetual, royalty free license to reproduce the BTA/MTA county listings in hard copy or electronic form, and to combine them with other data to create derivative works, subject to the following conditions:

- (a) The listing in whatever form licensed and any such reproductions or derivative works created by end users may be used solely for those end users' internal purposes, and may not be sold, licensed, transferred or otherwise distributed to third parties. Internal use is intended to include such uses as referencing or reproducing parts of the listing or selected BTAs or MTAs in any auction bid documents or other correspondence with the FCC as well as any internal analysis of the listing or the trading areas described in the listing. Other reasonable internal uses are also likely be included.
- (b) The license provided to end users extends only to use of the listing and reproductions or derivative works created therefrom by end users in connection with this FCC proceeding or FCC requirements for geographic boundaries for PCS (and possibly other Commission-licensed services with RMC's approval), and not to reproduction or adaptation for unrelated purposes.

3. If this modified proposal is accepted, RMC will allow end users who purchase the Commercial Atlas & Marketing Guide to extract the boundary data contained therein to create the BTA/MTA county listings in hard copy or electronic form, and to combine them with other data to create derivative works, also subject to the conditions described above in 2 (a) and (b).

C. Licenses to Repackagers/Resellers of RMC MTA/BTA County Listings

Reproduction by resellers or repackagers of the MTA/BTA county listings or creation of derivative works that incorporate them will require an express license from RMC. RMC is aware that some concerns have been raised about our current reseller licensing fee structure. Accordingly, in addition to licensing terms of the type already made available by RMC, RMC will also provide alternative flexible reseller/repackager licensing packages with terms and conditions that depend on the extent (in scope and time) of the proposed use.

Certain petitioners have suggested that it is somehow unfair to charge resellers or repackagers more than a nominal license fee. However, many resellers stand to gain substantial revenues through the reproduction and resale of RMC's copyrighted material. We believe our proposal will provide reasonable compensation to RMC for commercial exploitation of a work in which it has made a significant investment.

**D. Reproduction of the Commercial Atlas & Marketing Guide**

Neither end users nor resellers or repackagers are permitted to reproduce all or any portion of the Commercial Atlas & Marketing Guide, including the maps included therein.

**IV. If the Commission Finds RMC's Modified Proposal Unsatisfactory, We Respectfully Urge The Commission To Use An Alternative Source For Boundary Definitions.**

As set forth above, the MTAs and BTAs represent valuable intellectual property of RMC. This intellectual property, protected by the copyrights in RMC's Commercial Atlas & Marketing Guide and its Trading Area System MTA/BTA Diskette, reflects significant creativity on the part of RMC and its employees, as well as a substantial investment of resources. The conditions of our modified proposal described above will provide us with a greater ability to protect our intellectual property. Without them, our ability to protect our investment will be significantly diminished. For that reason, if the Commission finds that our proposal is unsatisfactory, we respectfully urge that it select an alternative means of defining the geographic boundaries for the PCS.

**V. Conclusion**

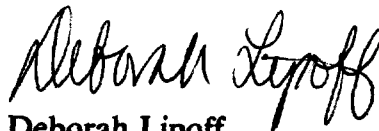
RMC remains willing to work with the Commission in its efforts to establish appropriate geographic boundaries for the PCS (and possibly other Commission-licensed services with RMC's approval). We have attempted in our modified proposal to meet the reasonable needs of both the Commission and the auction participants. We believe that as

a result of our modified proposal, small businesses should not experience unreasonable entry or long term costs, confusion or potential liability in obtaining or using the listing for internal purposes related to this FCC proceeding. The suggestion that RMC "will restrict the bidding process, lessen competition, increase auction costs and likely reduce the anticipated auction revenue to the Federal Government" (Quoting, Killen, Petition for Reconsideration, filed November 30, 1993) is similarly without merit given our proposal.

At the same time, however, we are committed to protecting our intellectual property and are concerned that absent appropriate safeguards, the cost of doing so will become prohibitive. Please do not hesitate to contact us if you have any questions or comments concerning this submission or our earlier letters to the Commission.

Respectfully submitted,

Rand McNally & Company

A handwritten signature in black ink, appearing to read "Deborah Lipoff", written in a cursive style.

Deborah Lipoff  
Assistant General Counsel

Rand McNally & Company  
8255 North Central Park  
Skokie, Illinois 60076  
(708) 329-6258

Dated: January 3, 1994

**CERTIFICATE OF SERVICE**

I hereby certify that I have this 30th day of December 1993 sent a copy of the foregoing Comments of Rand McNally on Petitions for Reconsideration and Clarification to the following by first class United States mail, postage prepaid:

Thomas Stoup  
Telocator  
1019 19th Street, N.W. #1100  
Washington, D.C. 20036

John Hearne, Chairman  
Point Communications Company  
100 Wilshire Blvd. #1000  
Santa Monica, California 90401

Michael Killen, President  
Killen & Associates, Inc.  
382 Fulton Street  
Palo Alto, California 94301

Jeffrey L. Sheldon  
Sean A. Stokes  
Utilities Telecommunications Council  
1140 Connecticut Ave., N.W.  
Suite 1140  
Washington, D.C. 20036

  
Deborah Lipoff